A

HANDSKAR (M) SDN BHD v. QUBE MEDICAL PRODUCTS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[SUIT NO: WA-22NCC-44-02-2023]
B 26 DECEMBER 2023

Abstract – *When a director acts, in the exercise of his functions as a director and within the scope of his authority, he essentially acts in the company's capacity and not his own. In other words, he is effectively the company and does not incur any tortious liability. If the law is to hold directors to be personally liable for the acts taken by the company in relation to a contract entered into by the company, when the directors are merely acting in the company's capacity and in the fulfilment of their duties towards the company, the doctrine of separate legal personality would be undermined.*

TORT: *Unlawful interference – Claim – Claim against company's director – Failure of company to complete delivery of goods under contract entered with claimant – Claim against company director for causing losses to claimant's economic interest – Whether director acting on behalf of company could be held tortiously liable for wrongful acts of company*

COMPANY LAW: *Directors – Action against director – Tort of unlawful interference – Failure of company to complete delivery of goods under contract entered with claimant – Claim premised upon tort against company director for causing losses to claimant's economic interest – Whether director acting on behalf of company could be held tortiously liable for wrongful acts of company – Whether director acted within scope of his authority*

CIVIL PROCEDURE: *Striking out – Application – Company failed to complete delivery of goods under contract entered with claimant – Claim premised upon tort against company director for causing losses to claimant's economic interest – Application by director to strike out claimant's action – Whether claim against director ought to be struck out*

The plaintiff had entered into an agreement, to purchase 120,000 OEM Gamma Gloves at a total contract sum of USD7.44 million ('supply contract'), with the first defendant company. The plaintiff made an upfront payment of 35% of the total contract sum, which was held by the first defendant, to be utilised towards the payment of 35% of the value of each container delivered in instalments. The payment of the balance 65% of the value of each container delivered in instalments was to be paid to the first defendant upon the gloves being made for deliveries. The defendants later indicated that the balance of the plaintiff's undelivered OEM Gamma Gloves

was subject to a price increment due to the hike in raw material prices. The plaintiff claimed that: (i) it was compelled to accept the revised contract price so that the defendants could complete the deliveries; and (ii) the plaintiff was required to signify the revised proforma invoice to record the revised contract price but, unbeknownst to the plaintiff, the delivery terms from 'December 2020' was altered to '2021' without the plaintiff's consent and agreement. The first defendant, however, failed to complete the deliveries by end of February 2021 and only 8,000 cartons were delivered. In March 2021, the plaintiff put the first defendant on notice that its customers required the first defendant to complete the deliveries by 31 July 2021 and any further deliveries beyond the deadline would be refused and the order would be declined. The first defendant failed to complete the deliveries by 31 July 2021 and only 64,000 cartons, out of 120,000 cartons of OEM Gamma Gloves were delivered. This prompted the plaintiff to terminate the supply agreement and to claim against: (i) the first defendant, premised upon the law of contract; and (ii) the second defendant, the director and shareholder of the first defendant, premised upon tort for causing loss to the plaintiff's economic interest by the unlawful acts and means undertaken directly and/or indirectly through the first defendant's personnel acting under the second defendant's control, instructions and/or directions. The second defendant applied to strike out the plaintiff's action.

Held (striking out plaintiff's claim against second defendant):

(1) Applying the principle in *Said v. Butt* to the present case, it was not pleaded in the plaintiff's statement of claim that the decisions/actions by the second defendant were decisions/actions: (i) that were not made in the course of the second defendant's duties as a director or officer of the first defendant; (ii) that were made beyond or outside the scope of the second defendant's authority; (iii) that were made in breach of the second defendant's fiduciary duties or other personal duties owed to the first defendant; and (iv) taken or done were not made or taken by the second defendant in the best interests of the first defendant. In fact, the plaintiff had not pleaded any facts or averments to bring its claims against the second defendant outside the immunity stated in the *Said v. Butt* principle. (paras 19 & 20)

(2) The mere fact that the second defendant who was, at the material time, a director and shareholder of the first defendant and was involved in making the decisions on the supply contract on behalf of the first defendant, without more, cannot in law give rise to any sustainable cause of action against him for the tort of causing losses by unlawful means and/or unlawful interference. The acts of the second defendant were the acts of the first defendant. (para 21)

Case(s) referred to:

Borneo Securities Holdings Sdn Bhd v. HLG Securities Sdn Bhd & Ors [2010] CLJU 1408; [2010] 1 LNS 1408 HC ***(refd)***

PT Sandipala Arthaputra and Others v. St Microelectronics Asia Pacific Pte Ltd and Others [2018] 1 SLR 818 ***(refd)***

Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors [2013] CLJU 104; [2013] 1 LNS 104 HC ***(refd)***

Said v. Butt [1920] 3 KB 497 ***(refd)***

For the plaintiff - Shanthiny Ya Ting Anpalagam; M/s Vin Law Co
For the defendants - Yuvaraj Sugapathy; M/s Sugapathy & Partners

Reported by Najib Tamby

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] In a claim against a company for breach of contract, it is becoming increasing common for the plaintiff to also include as defendants, the directors of the company with the view to make the directors personally liable for the claim based on a cause of action in tort *eg*, unlawful interference with the contract and or conspiracy with the company to injure the plaintiff.

[2] What is often ignored is the trite principle that when a director acts in the exercise of his functions as a director and within the scope of his authority, he essentially acts in the company's capacity and not his own. In other words, he is effectively the company. This means that if the law is to hold that the directors to be personally liable for the acts taken by the company in relation to a contract entered into by the company, when the directors are merely acting in the company's capacity and in fulfilment of their duties towards the company, the separate legal personality doctrine will be effectively undermined.

[3] In this judgment, this court applied the principle in *Said v. Butt* [1920] 3 KB 497 and strike out the plaintiff's claim against the second defendant, a director of the first defendant, for a cause of action based on the tort for unlawful interference with the plaintiff's contract with the first defendant. The mere fact that the second defendant was involved in making the decisions on the contract on behalf of the first defendant, without more, cannot in law give rise to any sustainable cause of action against him for the tort of causing loss by unlawful means and/or unlawful interference.

Background Facts

[4] The plaintiff entered into an agreement to purchase 120,000 OEM Gamma Gloves at a total contract sum of USD7,440,000 (USD62/carton) ("the supply contract") with the first defendant.

[5] The plaintiff made an upfront payment of 35% of the total contract sum which was held by the first defendant and to be utilised towards payment of 35% of the value of each container delivered in instalments. Payment of the balance 65% of the value of each container delivered in instalments was to be paid to first defendant upon the gloves were made ready for deliveries. A

[6] In mid-December 2020, the defendants indicated that the balance of the plaintiff's undelivered OEM Gamma Gloves was subject to a price increment due to the hike in raw material prices. B

[7] The plaintiff claimed that it was compelled to accept the revised contract price so that defendants could complete the deliveries by end of February 2021 pursuant to their revised November Delivery Schedule. C

[8] The plaintiff further claimed that the plaintiff was required to signify the revised proforma invoice (QMP/PI/615/0720rev02) to record the revised contract price but that unbeknownst to the plaintiff, the delivery terms from "December 2020" was altered to "2021" without the plaintiff's consent and agreement. D

[9] The first defendant failed to complete the deliveries by end of February 2021 and only 8,000 cartons were delivered. Sometimes in March 2021, the plaintiff put the first defendant on notice that its customer required the first defendant to complete the deliveries by 31 July 2021 and any further deliveries beyond the deadline would be refused and the order would be cancelled. E

[10] The first defendant failed to complete deliveries by 31 July 2021 and only 64,000 cartons out of 120,000 cartons of OEM Gamma Gloves were delivered. This led the plaintiff to terminate the supply agreement and to the action against the first defendant. F

[11] The plaintiff's claims against the second defendant is in tort for causing loss to plaintiff's economic interest by the unlawful acts and means undertaken directly and or indirectly through the first defendant's personnel acting under the second defendant's control, instructions and or directions. G

[12] In support of its claim against the second defendant, the plaintiff pleaded that the second defendant is the substantial shareholder and the principal decision-maker of the first defendant. It is common ground that the second defendant is and was at all material times a director of the first defendant. H

[13] In respect of the tort of causing loss by unlawful means and or unlawful interference, the plaintiff alleged as the second defendant's unlawful acts the following: I

(i) coercing and or exerting pressure on the plaintiff to agree with a price increase of the gloves under the supply contract; and

(ii) revising the delivery schedule of the gloves under the second supply contract unilaterally, dishonestly and surreptitiously through deceit.

[14] It is alleged that as a result of the unlawful acts carried out by the second defendant, the plaintiff had suffered losses and damages as result of:

(i) the first defendant's repudiatory and fundamental breach of the supply contract;

(ii) the first defendant's refusal to repay the balance deposit; and

(iii) the first defendant receiving payments as a result of a void agreement post the termination.

Court's Deliberation On Second Defendant's Striking Out Application

[15] From the aforesaid, it is clear that whilst the plaintiff's claims against the first defendant is grounded under the law of contract, the plaintiff's claims against the second defendant is based on a cause of action in tort. It is the second defendant's contention that the plaintiff's claims against the second defendant in tort is plainly and obviously unsustainable and ought to be struck out on the basis that the second defendant cannot be held tortiously liable for the wrongful acts of the first defendant.

[16] It is trite principle of law that a director acting on the company's behalf does not incur tortious liability if he has acted *bona fide* within the scope of his authority. Support for this proposition can be found in the century-old case of *Said v. Butt* [1920] 3 KB 497 where the King's Bench Division of the English High Court held as follows:

> If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of *Lumley v. Gye* (3), as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing. This far-reaching result of the principle here suggested by the plaintiff is emphasized, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only; whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoer are at large, and may vastly exceed the sum recoverable in a mere claim for breach of contract against the contractor: see *Pratt v. British Medical Association* (1) and *Exchange Telegraph Co. v. Gregory*. (2).
>
> Mr. Disturnal for the plaintiff argued with great vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from *Lumley v. Gye* (3) to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction: that a person who without just cause knowingly

procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this. *The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties.* If he is in the position of a stranger, he will be *prima facie* liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another: see the decisions cited in *Pratt's Case* (4) and the *Glamorgan Coal Case*. (5)

But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v. Gye* (1) principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr. Disturnal on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. (emphasis added)

[17] The principle in *Said v. Butt* had been cited with approval by our High Court in *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2013] CLJU 104; [2013] 1 LNS 104; [2013] 8 MLJ 157 and *Borneo Securities Holdings Sdn Bhd v. HLG Securities Sdn Bhd & Ors* [2010] CLJU 1408; [2010] 1 LNS 1408.

[18] In the fairly recent decision of the Singapore Court of Appeal in *PT Sandipala Arthaputra and Others v. St Microelectronics Asia Pacific Pte Ltd and Others* [2018] 1 SLR 818, the principle in *Said v. Butt* was discussed and it was held that the principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company. The relevant paragraphs are worthy to be reproduced *in extenso* below:

> [62] Having reviewed the authorities, we find that the scope of the *Said v. Butt* principle should be more clearly demarcated and defined to provide certainty for directors in the performance of their duties. *In our judgment, the Said v. Butt principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company.*
>
> [63] We begin by determining the reasons for limiting a director's personal liability for his company's contractual breaches. *First, conceptually, when a director acts in the exercise of his functions as a director and within the scope of his authority, he essentially acts in the company's capacity and not his own; he is effectively the company. This is the natural consequence of the separate personality doctrine. The company is an artificial entity which is given personality and status only through the machinery of the law. All of its acts are, in some manner or another, carried out or directed by its agents.* It thus makes little sense for a company to be induced into breaching its contract with a third party by the director's acts, which are treated in law as the company's own acts. As Jordan CJ stated in the Supreme Court of New South Wales decision in *O'Brien v. Dawson* [1941] 41 SR (NSW) 295 (at 307), which was affirmed on appeal to the High Court of Australia ([54] *supra*), *when an incorporated company acts through its agents, the agents "are not in the position of outsiders who are influencing the independent volition of a contracting party who is capable of exercising volition for himself".* It would also be wrong to treat the director as conspiring with the company, given that the director is acting as the company. There is effectively only one legal actor in play, *ie*, the company, and this is typically fatal to the fundamental requirement of a conspiracy that there be two or more persons acting in concert. *To hold that the company's agents are nevertheless personally liable for the acts taken by the company in relation to a contract entered into by the company, when they act in the company's capacity and in fulfilment of their duties towards the company, undermines the separate legal personality doctrine* and makes nonsense of this fiction that undergirds the fundamental tenets of company law.
>
> [64] *The second reason is one of policy, namely, that of ensuring that directors are not unduly deterred by fear of personal liability when taking decisions in the company's interests. This ensures the efficacious conduct of commercial life.* Carthy JA in *ADGA Systems* (at [15]) stated, and we respectfully agree, that the *Said v. Butt* ([4] *supra*) principle assures that directors are capable of directing that a contract of employment be terminated or that a business

contract not be performed, if it is in company's best interest to instead pay the damages for failure to perform. Here, V K Rajah JC's warning in *Vita Health Laboratories Pte Ltd v. Pang Seng Meng* [2004] 4 SLR(R) 162 at [17] against unduly putting directors at risk of legal liability for commercial decisions that they had made in the best interests of the company is apposite:

> … Directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences. *Bona fide* entrepreneurs and honest commercial men should not fear that business failure entails legal liability. *A company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk. Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.*

[65] *On the basis of the two reasons above, our view is that the most appropriate elucidation of the Said v. Butt principle is that a director would ordinarily be immune from tortious liability for authorising or procuring his company's breach of contract in his capacity as a director, unless his decision is made in breach of any of his personal legal duties to the company. In our judgment, the principle operates as a requirement of liability and not a defence; in other words, the onus is on the plaintiff to prove that the defendantdirectors' acts were in breach of their personal legal duties to the company. Such breach may be a breach of a fiduciary duty to act in the best interests of the company, or it may be a breach of his contractual duty towards the company to act within the scope of his authority as granted by the company.* We thus endorse, to a large extent, Waller J's interpretation of the principle in *The Leon* ([57] *supra*) and the reasons proffered by Assoc Prof Lee in support of this approach in Company and Its Directors as Co-conspirators, which we quote (at para 28):

> (The *Said v. Butt*) immunity will be lost if … (the director) commits a breach of a personal legal or contractual duty. Such unlawful conduct may include, for instance, a breach of the director's fiduciary duty to the company, as may occur where a director has acted to advance his own or another's interests rather than the best interests of the company, or where his conduct is akin to fraud. By insisting on proof of some independently unlawful conduct on the part of the director, this approach precludes any attempt to affix personal liability on a director whose only wrong is having acted with malice or ill motive towards the claimant. …

[66] *Importantly, the applicability of the principle focuses on the director's conduct and intention in relation to his duties towards his company, and not towards the third party. This was succinctly explained by Kan Ting Chiu J in his decision in Otech Pakistan Pvt Ltd v. Clough Engineering Ltd [2005] SGHC 98 ("Otech") at [25], where he interpreted the requirement of bona fide in the Said v. Butt principle to mean that the defendant was acting in good faith in the discharge of his office, and not that he was acting in good faith in the action complained of; a director may believe that it is for the good of the company to breach a contract intentionally.* We thus respectfully disagree with Mr Singh's submission that an intention

to injure the third party would suffice to take the director outside the *Said v. Butt* principle, and Andrew Ang J's observation in *Lim Leong Huat v. Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 ("*Lim Leong Huat (No 1)*") at [36] to similar effect. Mr Singh's submission assumes that a director in deciding that the company should breach a contract with the intention to injure a third party cannot *ipso facto* be said to be acting *bona fide* in the best interests of the company. *This was precisely the argument which was correctly rejected by Kan J in Otech because the relevant focus of the bona fide inquiry is vis-à-vis the company and not the third party. It is thus insufficient that the director, through the company, directed a breach of contract that would have benefitted the director and the company to the detriment of third parties. If the director acted in the best interests of the company and not in breach of any of his other duties owed to the company, notwithstanding that he also possessed the intention to injure the third party or to induce a breach of contract as against the third party (as the case may be), he would still be entitled to the protection of the Said v. Butt principle.*

[67] Further, in our judgment, this formulation of the *Said v. Butt* principle obviates the need for the presence of any other "additional factor" to determine a director's liability, such as the requirement of a dominant purpose to injure the third party, as suggested by Marshall JA in *Imperial Oil* ([54] *supra*) (see [60] above). The superimposition of the "additional factor", with respect, misses the focus of the *Said v. Butt* principle, which is directed at a director's actions in relation to the company as opposed to third parties, and also unnecessarily conflates the requirements for unlawful means conspiracy (where only an intention to injure is required) and lawful means conspiracy (where a predominant intention to injure is required). We note also that Woo J in *Chong Hon Kuan* ([51] *supra*) had observed that even for lawful means conspiracy, "something more" beyond a predominant intention to injure would be required to take the director out of the protection of the *Said v. Butt* principle (see [56] above). Our view is that the requirement that the director's conduct be a breach of his personal duties to the company would operate as a robust limiting principle.

[68] We reach this conclusion for a number of reasons. First, the re-characterisation avoids the difficulties that have plagued the *Said v. Butt* ([4] *supra*) principle, such as what it means to act in good faith or whether a predominant intention to cause harm to the contracting party is sufficient to take the director out of the protection of the principle. It leaves the answer to the body of law that already regulates how a director should act in relation to his company, and ensures consistency in the law. Thus, the question of whether a director who has acted with the predominant intention to cause economic harm to the other contracting party should be personally liable can be answered with reference to whether the director has acted in the best interests of the company. This approach also supports commercial certainty and efficacy in the performance of a director's functions. *A director should be free to make decisions regarding the company's contracts as long as he does not breach his personal duties to the company, which he should be well aware of.*

> [69] Second, it is desirable that the answer to the question of whether a director is acting in a manner that ought to absolve him from personal liability is consistent with whether he has acted in breach of his duties to the company. *The alignment of immunity from personal liability with a director's personal duties to his company reinforces the view that where a director is acting within such confines, his acts ought properly to be regarded as those of the company's and not himself. It would thus be unfair to hold him personally liable for such decisions.* But where a director has stepped outside of his authority, or has otherwise breached his duties to the company in directing the company's breach of contract, he ceases to act in the company's best interests and steps outside as a third party capable of conspiring or otherwise dealing with the company. In so doing, his act becomes his own, as does any consequent tort. He is no longer entitled to protection on the basis that he has acted as the company, and should be treated as any other stranger who has procured a breach of contract by a company. This also addresses Marshall JA's objection in *Imperial Oil* that a director's duties are owed to his company and he should not answer to third parties for his performance of such duties (see [60] above). *The focus is not on the third party's relationship with the director but the director's relationship with the company: it is not that third parties have any influence or stake in a director's performance of his duties to his company, but that only a director who properly acts in the capacity of the company should be absolved from personal liability for his role in the company's breach of contract.* The balance we have struck also makes sense because there is a compelling policy imperative in not having to place a director in a conflict between acting in the best interests of the company and having to face the prospect of any resultant liability to a third party. This balance also explains why it is inherent in the cause of action itself that the plaintiff must establish that the director was not acting in the best interests of the company and not that it is a defence for the director to mount.

[19] Applying *Said v. Butt* to the present case, it is not pleaded in the statement of claim that the decisions or actions by the second defendant were:

(i) decisions or actions that were not made in the course of the second defendant's duties as a director or officer of the first defendant;

(ii) decisions and actions made were beyond or outside the scope of the second defendant's authority;

(iii) decisions or actions made were in breach of the second defendant's fiduciary duties or other personal duties owed to the first defendant; or

(iv) decisions or actions taken or done were not made or taken by the second defendant in the best interests of the first defendant.

[20] In fact, the plaintiff has not pleaded any facts or even averments to bring its claims against the second defendant outside the immunity stated in the *Said v. Butt* principle.

[21] The mere fact that the second defendant, who was at the material times a director and shareholder of the first defendant, and was involved in making the decisions on the supply contract on behalf of the first defendant, without more, cannot in law give rise to any sustainable cause of action against him for the tort of causing loss by unlawful means and/or unlawful interference. The acts of the second defendant are the acts of the first defendant.

[22] The plaintiff's only contention in answer to the *Said v. Butt* principle is to assert that it is seeking to hold the second defendant to be personally liable and that the plaintiff's claims against the second defendant is "a distinctive claim" where the plaintiff is claiming general and special damages against him personally for committing the tort of unlawful interference and causing loss to the plaintiff by unlawful means.

[23] With respect, the aforesaid is nothing more than a self-serving assertion without proffering any legal basis or explanation to the question as to why the second defendant, who is not alleged to have breached any fiduciary duties and was acting in the best interest of the first defendant, ought not to be protected by the *Said v. Butt* principle.

[24] Based on the above, it is my judgment that the plaintiff's claims against the second defendant is plainly and obviously unsustainable.

Conclusion

[25] In the circumstances, this court grants an order in terms of the second defendant's striking out application with costs.